SUPREME COURT, U. S.

APR 6 1970

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of The United States

OCTOBER TERM, 1969

No. 1335

EUGENE SAND & GRAVEL, INC., *Appellant*,
CITY OF EUGENE, of Lane County, Oregon, a municipal Corporation, *et al*, *Defendants*,

v.

RAYMOND N. LOWE, *et al*, *Appellees*.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OREGON

SUPPLEMENT TO JURISDICTIONAL STATEMENT

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April 3, 1970

No. 1335

BASIS FOR SUBMITTING THIS SUPPLEMENT

Appellant appeals from a decree of the Supreme Court of Oregon entered December 19, 1969. Within 10 days prior to the 90th day, March 9, 1970, Appellant applied to Mr. Justice Douglas for an extension of time, supported by affidavit and substantiating exhibits. It is the understanding of Counsel that a prompt ruling on such motion would enable them to proceed with emergency speed if necessary. No ruling had been made as of the close of business in this Court March 17 or 18, 1970. Counsel, at high overtime printing and office expense, hurriedly prepared and filed by courier air delivery, a Jurisdictional Statement March 19, 1970. Herewith, Counsel submit vital material which because of this situation did not get into the Jurisdictional Statement. This contingencywas noted on page 15 of said Statement. If fitting, desirable or necessary that a nunc pro tunc order be made to cover, such is now reasonably and respectfully requested.

CASES SUSTAINING JURISDICTION

In accordance with Rule 51 1 (b) (iv) of this Court, Counsel submit the following cases as sustaining jurisdiction:

(1) The Missing No-Establishment Issue: *Marbury v. Madison,* 1 Cranch 137, 2 L ed 60; *Thompson v. State of Utah,* 170 US 343; *American Federation of Labor v.*

Watson, 60 F Supp 1010 (D.C.S.D. Fla 1945) *People v. Western Union Tel. Co.*, 198 P 146 (Colo); *Miller et al v. Johnson, et al*, 92 Ky 589, 18 SW 522, 524; *Corporation of Sisters of Mercy v. Lane County*, 123 Or 144, 201 P 694.

(2) The pro tem Justice Issue: *Brinkerhoff-Faris Co. v. Hill*, 281 U.S. 673, 677-678, *Saunders v. Shaw*, 244 U.S. 317. On raising at first opportunity on petition for rehearing level. *Sultan Ry. Co. v. Department of Labor*, 277 U.S. 135. On the effect of a Rule of Court contravening a state statute or provision of a constitution. *Moberg v. Baker*, 217 Or 551, 307 P2d 759, 342 P2nd 825, (1959) *State v. Reyes*, 209 Or 595, 601, 303 P2nd 519 (1951), 20 Am Jur 2nd Courts, pp 446-449, Secs 84-86.

(3) The *Specific* Limitation Issue—Article I, Sec 5: *Torcaso v. Watkins*, 367 U.S. 488 (state constitutional provision a "statute"), *Brinkerhoff-Faris Co. v. Hall*, supra, *Saunders v. Shaw*, supra.

ADDITIONAL STATUTES INVOLVED

Oregon State Constitution, Article VII, Amended Section 2a(3); Oregon Revised Statutes 2.055, 1.260 (2), 2.111 (5), 14.210 (1) (b), 1.210, 1.290 (1) are substantially set forth in Appendix "1," infra. Counsel contend that Rule 47(2) of the Supreme Court of Oregon directly violates ORS 14.210(1) (b), construed with the other named statutes, as well as the state constitutional provision, Article I, Sections 10 and 20 of the Oregon State Constitution and is repugnant to the due process, equal protection and privileges and immunities provisos of the 14th Amendment. This is submitted in compliance with Rule 15 1 (b) (v) of this Court.

QUESTIONS PRESENTED - ADDENDUM

Quetion 2 (the pro tem Justice issue), page 3 of Jurisdictional Statement, line 13 "(Rule 47)" should be expanded to read: "(Rule 47, which contravenes a state statute, ORS 14.210 (1) (b), and Article VII, Amended, Section 2a(3) of the Oregon State Constitution)": This is submitted in compliance with Rule 15 1(d) of this Court.

STATEMENT OF THE CASE - ADDENDA

(In accordance with Rule 15 1 (d) of this Court)

(1.) The Missing No-Establishment Issue was raised promptly after discovery in Appellant's first brief to the Supreme Court of Oregon, pp 39-40, 204-205 on December 8, 1967. The matter was not mentioned in the Oregon Court's February 26, 1969, opinion, nor was it mentioned by that Court in its October 1, 1969, opinion. Appellant, on November 28, 1969, both in its petition for rehearing, brief and motion to admit newly relevant material, raised the issue again. No opportunity was afforded for argument either on the petition or motion, nor has the motion been ruled on by that Court to date. See Record 163.

(2.) The pro tem Justice issue was raised April 29, 1969, in Appellant's petition for reconsideration to the Supreme Court of Oregon, five days after the appearance of the Eugene Register Guard news article, dated April

24, 1969 (Appendix "2" infra). This article, apparently on Court-based information, stated that a decision could be "considered" by a Court because a pro tem justice was part of it, thus making a pro tem justice "second class," rather than first rank in the performance of his judicial duties on the Supreme Court. See Oregon State Constitution Article VII, Amended, Sec 2a(3). Appellant timely raised the issue following the October 1, 1969, opinion, at its first opportunity in its petition and brief for rehearing on November 28, 1969, claiming the action of the Supreme Court of Oregon in its October 1, 1969, opinion was repugnant to the 14th Amendment of the Constitution of the United States (due process, equal protection, privileges and immunities).

(3.) Article I, Section 5 of the Oregon State Constitution as a *specific* limitation issue: Objections that this provision was being twisted out of its plain language meaning and hence, not applicable were raised at demurrer, answer and trial stages and included in Assignment of Error I in Appellant's brief in the Supreme Court of Oregon pp 37-39 filed December 8, 1967. The February 26, 1969, opinion of the Court, ruled no violation of Federal or State constitutions. Therefore, the next challenge to Article 1, Section 5, came after the October 1, 1969, opinion. The question was timely raised in Appellant's petition for rehearing and brief of November 28,

1969, and motion of same date to admit newly relevant material—the missing no-Establishment provision. The December 19, 1969, opinion raises new points for the first time which Appellant considers in this Jurisdictional Statement. See Record 25, 45, 59, 65, 79, 106, and 131.

THE QUESTIONS ARE SUBSTANTIAL-ADDENDA

(1) The missing general no-Establishment issue: The omission of this section from the State Constitution through a clerk's error in 1857 renders Article I, Sections 2 and 3 (Exercise sections) fatally defective and repugnant to the First and Fourteenth Amendments under *Everson v. Board of Education.* See *Ludwig v. Western Union,* 216 U.S. 146, 162; *Pullman Co. v. Kansas,* 216 U.S. 56, 58. When the Supreme Court of Oregon bypassed this vital problem in its October 1, 1969, opinion, Counsel on November 28, 1969, applied to the Oregon Court for submission of this issue on a trial de novo (Record 163). A similar motion was filed the same day regarding the War Memorial Park Dedication by Eugene's City Council in 1934, which *also* was discovered after the case was on appeal. The trial court had stricken the "park purposes" issue from the pleadings (Record 47, 59, 65) so such matter was *not* litigated, then turned around on January 5, 1967, and gave its decision *not* on the constitutional personal rights which alone were liti-

gated (Record 14, 100) but on the park purposes issue!

The December 19, 1969, opinion is neither fair nor correct in calling these two matters "afterthoughts." Such a claim alone, avoiding two crucial issues, is an egregious denial of due process. The failure of the Oregon Supreme Court to pass on the missing no-Establishment provision situation should be basis for appeal. *Lawrence v. State Tax Commission,* 286 U.S. 282-283; *Bantam Books Inc. v. Sullivan,* 372 U.S. 58, 61, note 3.

(2) Supreme Court of Oregon Rule 47(2) is repugnant to state statutes, the State Constitution and the Fourteenth Amendment: Appendix "1" infra, spells out the provisions of state statutes and the constitution. ORS 14.210(1)(b) plus Article VII Amended, Section 2a(3) of the Oregon Constitution appear violated by the October 1, 1969, opinion. The administering of justice, in accord with Article I, Sections 10 and 20 of the Oregon State Constitution "openly * * * and completely" and "upon the same terms * * * to all citizens" is not met when the Constitution of the State and its statutes give "full faith and credit" to the participation of a pro tem justice, only to have it taken away by minority manipulation of a Rule of Court. Such strikes hard at Appellant's right to due process, to equal protection of the laws (one rule as to a full bench of permanent justices;

another, as to a bench with a pro tem justice on it). Similar parties, thus, have been given more favorable treatment. *Ellis v. Dixon,* 349 U.S. 458, 460-462 (violation of privileges and immunities).

The Rule of Court, as applied, is invalid by reason of repugnancy to the Fourteenth Amendment. When newspapers openly state that a case turns on a pro tem justice being the deciding factor, and the resulting action is in the teeth of all relevant state statutes, state and federal constitutional provisions, plainly, Appellant has been denied.

(3) The *specific* limitation against use of State Treasury money from the State Treasury for the benefit of sectarian schools and theological seminaries in Article I, Section 5, was designed *to accompany* the missing no-Establishment provision. When applied to limit use of municipal *land* under a revocable permit for a decorative cross monument it is repugnant to the First and Fourteenth Amendments and Article VI of the Constitution of the United States. The rule of use is *broader* with reference to parks and streets than public buildings. *Milwaukee County v. Carter,* 45 NW2d 90, 92 (Wis 1950) See Hammett "The Homogenized Wall" 53 A.BA.J. 929, 936 (1967); *Stead v. President etc of Commons of Kashaskia,* 243 Ill 239, 90 N.E. 645 (1909). Article I, Section 5 is a specific *limitation;* not a *replacement* of a miss-

ing general no-Establishment provision. The December 19, 1969, interpretation of the Supreme Court of Oregon goes squarely into the face of plain meaning and the time-honored doctrine of its own that every section, clause, word of the Contitution is welded into place. *Corporation of Sisters of Mercy v. Lane County,* 123 Or 144, 150, 261 P 694.

Other state constitutions with provisions like Oregon (Appendix "3") uniformly agree that "religious and theological institutions" under the doctrine of contemporaneous construction refer to sectarian schools and theological seminaries. Carey's book, *The Oregon Constitution,* bears this out at every turn. The interpretation reached in the December 19, 1969, opinion is contrary to all historical documents and public records in the archives of the State of Oregon. A court may not read in omissions, nor may it change constitutional defects. 16 CJS, Constitutional Law, pp 745-746, Section 151.

THE STATE ISSUE ON ARTICLE I, SEC. 5 IS NOT SUFFICIENTLY AN INDEPENDENT GROUND

The December 19, 1969, opinion clearly shows a lack of any "independent" state constitutional ground. The decision on Article I, Section 5 is totally and erroneously based as to law and fact. See Appendix to Jurisdictional Statement, pp XXX, par 2 where the Oregon Court ex-

plicitly concedes a lack of an Establishment or credal preference section. There is *no* foundation in words, history or substance on which to base or read in such a missing proviso into Article I, Sec. 5—a *specific* limitation on state treasury funds for sectarian schools. *Dickman had* a basis: $4,000 worth of text books for Catholic schools paid from the state treasury. There is some rational basis there; none here—where the words, on their face, are totally twisted out of plain meaning in derogation of Appellant's Federal rights. A bald claim of "independent" state ground lacks any merit. As in *Cramp v. Board of Public Education,* 368 US 278, 281 the Oregon Court's interpretation of Article I, Sec. 5 impinges on constitutionally protected rights of speech, association and conduct, and Appellant is denied due process of law. The purported state ground stifles and avoids vindication of Federal rights.

Thus, it is unsubstantial, illusory and used as a device to freeze out Appellant and to avoid the claim and adjudication of Federal rights. The Federal rights are not only interwoven, but are *the* issue which the Oregon Court completely evades. *Hartford Life Insurance Co. v. Johnson,* 249 US 490, 493; *Wolfe v. North Carolina,* 364 US 177, 195. This Court should not overlook this pretense to avoid. *Nickel v. Cole,* 256 US 222, 225; *Atlantic Coast Line R.R. Co. v. Mims,* 242 US 532, 535. Appellant

has squarely raised the Federal issues and the state court has avoided and put them aside. See Davis v. *Wechsler*, 263 US 22, 24; *NAACP v. Alabama*, 357 US 449, 455-458, 377 US 288. The decision of the state court does not rest on either a fair or substantial basis. *Lawrence v. State Tax Commissioner*, 286 US 276, 282-283.

CONCLUSION

Wherefore, Appellant respectfully prays that this Court hear the issues presented by this appeal—firmly believing that, in importance, it joins the significant First Amendment religious proviso cases of the last 25 years from *McCollum* and *Everson* through *Schempp* and *Verner*.

Respectfully submitted,

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April 3, 1970

APPENDIX "1"

OREGON PRO TEM JUSTICE PROVISIONS

Article VII, Amended, Section 2a, State Constitution:

"The Legislative Assembly or the people may by law empower the Supreme Court to * **:

(3) Assign judges of courts inferior to the Supreme Court to serve temporarily outside the district for which they were elected.

A judge or member of the bar so appointed or assigned *shall while serving have all the judicial powers and duties of a regularly elected judge of the court to* which he is assigned or appointed." (Emphasis supplied)

STATUTES

ORS 2.055

"Each judge serving as judge pro tempore of the Supreme Court * * * has all the power and duties, during the term of his appointment, of a regularly elected and qualified judge of the Supreme Court. Every decision, order or determination made by the Supreme Court while one or more judge pro tempore are so serving as judges of the court *shall be as binding and effective in every respect as if all the judges participating were regularly elected judges of the court.* (Emphasis supplied)

ORS 14.210(1)(b)

"*A judicial officer shall not act* as such in a court of which he is a member in any of the following cases:

(b) *When he was not present and sitting as a member of the court at the hearing of a matter submitted for its decision;* * * *" (Emphasis supplied)

ORS 1.210

"A judicial officer is a person authorized to act as a judge in a court of justice."

A Supreme Court justice is a "judicial officer." See also ORS 1.260 and 1.290(1) affirming this recognition of a "judge" serving on the Supreme Court.

APPENDIX "2"

PRO TEM JUSTICE ISSUE

Eugene Register-Guard, April 24, 1969

Cross Review Tied To 'Outsider's' Vote

The Skinner Butte Cross case will be reheard by the Oregon Supreme Court because it was the vote of a pro tem justice that decided the case originally, the Register-Guard has learned.

The high court agreed Wednesday to rehear the case, probably in June. The court earlier this year had ruled 4-3 that the cross could remain atop kinner Butte, in a city park at the north edge of downtown Eugene.

Chief Justice William C. Perry, in announcing Wednesday that the court would rehear the case, gave no indication of the reason for the rehearing. But the Register-Guard learned Thursday that the justices were concerned with the "pragmatic" problem of a tie vote among the six regular justices sitting during the first hearing.

Pro Tem Justice Virgil Langtry of Portland cast the deciding vote, and wrote the majority opinion.

Justice Ralph Holman was in Klamath Falls the day the court first heard the cross case. All seven regular justices will be on the bench when the rehearing is held, a court source said Thursday.

The reason the court made no official comment in ordering the rehearing, according to the source, is that "the court wants to be free to examine each of these questions again." Citing one or more reasons would tend to indicate that the court agreed with that point, the source said.

The petition for a rehearing presented by attorneys for the 10 Eugene citizens seeking the cross' removal raised three arguments for a rehearing. In addition to the vote of a pro tem judge, the petition asserted that the Supreme Court erred in not considering a point raised by the Lane County Circuit Court in the case, and that the court's ruling would tend to validate the presence of any religious symbol on any piece of public property, in violation of the First Amendment.

APPENDIX "3"

STATE CONSTITUTIONAL PROVISIONS BEARING ON OREGON'S ARTICLE 1, SECTION 5

Sect = Church or Denomination

Institution = Sectarian Schools or Theological Seminaries

Alabama 1901 Article XIV, Sec 63
Alaska 1959 Article VII, Sec 1
Arizona 1912 Article IX, Sec 10
Colorado 1876 Article IX, Sec 7
Delaware 1897 Article X, Sec 3
Florida 1887 Decl of Rights, Sec 6
Hawaii 1958 Article IX, Sec 1
Idaho 1890 Article IX, Sec 5
Illinois 1870 Article VII, Sec 3
*Indiana 1851 Article I, Sec 5
Kentucky 1891 Bill of Rights, Sec 5
Louisiana 1921 Article XII, Sec 13
*Michigan 1963 Article I, Sec 4
*Minnesota 1857 Article I, Sec 16
Minnesota 1857 Article VIII, Sec 3
Mississippi 1890 Article 8, Sec 208
Missouri 1945 Article IX, Sec 8
Montana 1889 Article XI, Sec 8
Nebraska 1875 Article VII, Sec 11
New York 1895 Article XI, Sec 4
South Dakota 1889 Article VI, Sec 3
*Texas 1876 Article I, Sec 7
*Utah 1896 Article X, Sec 13
Virginia 1902 Article IX, Sec 141
*Wisconsin 1848 Article I, Sec 18
* especially significant wording

APPENDIX "4"

28 CASES SUPPORTING APPELLANT'S POSITION

Federal Cases

Board of Education Central School Dist. No. 1 v. Allen, 392 US 236; *Zorach v. Clauson,* 343 US 306; *Paul v. Dade*

County, 202 So2d 833 (Fla Ct App), cert den Fla Sup Ct 207 So2d 690, cert den 390 US 1041; *Chamberlain v. Dade County Board of Public Instruction*, 143 So2d 21, rev'd other gds 377 US 402, *Lewis v. Allen*, 11 App Div 2nd 447, Aff'd NYS 2d 867, cert den 379 US 923; *Smith v. Denny*, 280 F Supp 651 (D.C. Cal 1968); *Protestants and Other Americans United for Separation of Church and State et al v. O'Brien*, 272 F Supp 712 (USDC 1967) *Sheldon v. Fannin*, 221 F Supp 766, 774 (USDC Ariz 1963)

State Cases

(Monuments, memorials, scenes, symbols, signs, practices)

Capen v. City of Portland, 112 Or 14, 228 P 105 (1924); *State ex rel Singelmann v. Morrison*, 57 So2d 238 (Ct App La 1952); *State ex rel Johnson v. Boyd*, 217 Ind 348, 28 NE2d 256 (1940); *Craig v. Mercy Hospital-Street Memorial*, 45 So2d 809, 817 (Miss 1950); *Sawyer v. City of Norfolk, et al* (Virginia Circuit Court, City of Norfolk, Chancery No. 7252-C, 1962); *Thomas v. Daughters of Utah Pioneers*, 197 P2d 477 (Utah 1948); *Tompkins v. Hodgson*, 2 Hun 146 (NY 1864); *Parsons v. Van Wyck*, 56 App Div 329, 67 NYS 1954 (1900); *Brahan v. City of Meridian*, 111 Miss 30, 71 So 170 (1916); *Vale v. City of San Bernardino*, 109 Cal App 102, 292 P 689 (1930); *Baer v. Kolmorgen*, 181 NYS 2d 230 (Sup Ct, NY 1958); *Lawrence v. Buchmueller*, 243 NYS 2d 87 (Sup Ct NY 1963); *Los Angeles County v. Hollinger*, 19 Cal Rptr 648 (DCA Cal 1962); *Lincoln v. Page*, 241 A2d 799 (NH 1968); *Koerner v. Borck*, 100 So2d 398 (Fla 1958); *Opinion of the Justices*, 228 A2d 161 (NH 1967); *Reichwald v. Catholic Bishop of Chicago*, 258 Ill 44, 101 NE 266 (1913); *Shelley v. Lebanon County*, 10 Lebanon 84 (Pa Comm Pl 1964); *State v. Williamson*, 347 P2d 204 (Okla 1959); *People ex rel New York League for Separation of Church and State v. Lyons*, 173 Misc 821, 21 NYS2d 250 (1940).

PROOF OF SERVICE

STATE OF OREGON)
) ss.
County of Lane)

I, JOHN E. JAQUA, an attorney in the office of Jaqua,Wheatley & Gardner, attorneys of record for Appellant, Eugene Sand & Gravel, Inc., depose and say that on the 3rd day of April, 1970, I served a copy of the foregoing Supplement to the Jurisdictional Statement in compliance with Rule 33 (1) (3) (4) of the Supreme Court of the United States on

Hans A. Linde
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by placing a true and correct copy thereof, duly certified to be such by me as such attorney, in a sealed envelope, postage fully prepaid and depositing the same in the U. S. Post Office, at Eugene, Lane County, Oregon, on the date stated below. Said attorneys reside or have their offices at said addresses.

I certify that I reside and have my office in Eugene, Lane County, Oregon.

Dated: April 3, 1970

JOHN E. JAQUA
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